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No. 91-1843

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES DAVIS NELSON, JR.,
Petitioner,

v.

UNIVERSITY OF ALABAMA SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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BRIEF OF RESPONDENTS IN OPPOSITION

PAUL E. SKIDMORE *
GEORGE B. GORDON
Office of Counsel
THE UNIVERSITY OF ALABAMA SYSTEM
P.O. Box 870106
Tuscaloosa, AL 35487-0106
(205) 348-5490
Attorneys for Respondents

* Counsel of Record

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QUESTION PRESENTED

I. Is summary judgment properly entered under Rule 56 of the Alabama Rules of Civil Procedure subject to challenge in federal court as a deprivation of due process, where respondents conclusively demonstrated that there are no genuine issues of material fact to be tried, and petitioner, after discovery, has failed to produce any evidence indicating that genuine issues of material fact do exist?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption and in the petition for writ of certiorari, Dr. James G. Taafe is a party. Mr. Winton Blount, Mr. Sam Earl Hobbs, Dr. Joab L. Thomas, Dr. Thomas Bartlett, and Dr. Douglas Jones, who were defendants-appellees in the proceedings below, no longer hold offices as officials, and therefore are not parties in this Court. See Sup. Ct. R. 35.3.

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Nelson v. University of Alabama Sys.*, 594 So. 2d 632 (Ala. 1992). A copy of this opinion appears in the appendix to this brief because portions of the text are omitted from the opinion reproduced in the petition. Brief in Opposition [hereinafter "Opp. Br."] at 1a, *Nelson v. University of Alabama Sys.*, 594 So. 2d 632 (Ala. 1992) (No. 91-1873).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The petition was timely filed.

STATEMENT OF THE CASE

A. The Facts:

1. *Proceedings Below.*

Petitioner filed suit on April 26, 1989, alleging constitutional claims as well as claims of fraud, deceit, libel, slander, and "academic fraud."

On May 25, 1989, respondents filed a motion to dismiss raising a variety of defenses, including sovereign immunity, qualified immunity, and estoppel. At the motion hearing on July 27, 1989, the trial court granted a continuance to permit petitioner to amend his complaint. Petitioner filed an amended complaint on September 1, 1989.

Respondents' motion to dismiss was argued November 8, 1989. On December 28, 1989, the trial court dismissed all but three counts of the amended complaint which alleged 42 U.S.C. § 1983 claims of denial of procedural due process, equal protection, and conspiracy. As to these remaining claims the court also dismissed many of the named respondents.[1] Opp. Br. at 6a.

Following almost ten months of discovery, respondents on October 31, 1990, filed a motion for summary judgment, which was supported by several affidavits. The motion was set for hearing on December 7, 1990. Before the hearing date, petitioner noticed three depositions and obtained a continuance of the summary judgment hearing.

On January 11, 1991, petitioner moved for summary judgment. The trial court heard arguments on both summary judgment motions on February 19, 1991, and subsequently entered summary judgment in favor of all respondents on all claims on February 21, 1991.

On March 18, 1991, petitioner filed with the trial court a motion to alter, amend, or vacate the summary judg-

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[1] On appeal to the Alabama Supreme Court, petitioner did not challenge the trial court's ruling on respondents' motion to dismiss.

ment which was set for hearing on April 10, 1991. When the trial court did not issue a ruling within ninety days after the hearing, the motion was denied procedurally. Ala. R. Civ. P. 59.1.

Thereafter, petitioner pursued an appeal to the Supreme Court of Alabama. On January 24, 1992, the Alabama Supreme Court affirmed the trial court's judgment, and on February 21, 1992, denied his request for rehearing.[2]

2. *The Events Leading To Petitioner's Lawsuit.*

In the 1986 fall semester, the University admitted petitioner to pursue a course of study in the Capstone College of Nursing. At the conclusion of the 1986 fall semester, petitioner was placed on indefinite academic suspension from the University. With the assistance of Dean Mobley, the University waived petitioner's suspension and allowed him to enroll in nursing courses for the 1987 spring semester. In the 1987 spring semester, petitioner enrolled in two courses: Nursing 214—"Medication Calculations" and Nursing 256—"Nursing Process."

Nursing 256 is a clinical course. It has a theoretical phase and a clinical phase. The theoretical phase consists of lectures concerning the subject matter of the course. The clinical phase has two parts. In the first part, students practice nursing skills in a simulated environment. In the second part, students gain real-life nursing experiences from working in hospitals or other patient care facilities. In order to pass Nursing 256, a student must obtain a passing grade, which is based on tests and papers, in the theoretical part of the course, must obtain a satisfactory evaluation in the clinical part of the course, and must sit for the National League of Nursing Achievement Test ("NLN test"). Petitioner

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[2] Petitioner was represented by counsel throughout all lower court proceedings.

failed Nursing 256 because he received an unsatisfactory clinical evaluation, and he did not sit for the NLN test.

As a consequence of his poor academic performance in the 1987 spring semester, petitioner was placed again on indefinite academic suspension.

Following the end of the semester in May, 1987, petitioner for the first time began to voice complaints about his instructor in Nursing 256. His complaints alleged incompetency on the part of his instructor, Professor Adams, rather than some impropriety relating to his grade in Nursing 256. After talking with Dean Mobley and Associate Dean Awtrey, petitioner was advised by each of them that if he was displeased with his grade in Nursing 256, he could file an academic grievance under the University-Wide Academic Grievance Procedures.

The University-Wide Academic Grievance Procedures is a process by which a student can request a multi-level, non-judicial review of an academic action that adversely affects the student's course grade. The review process begins with attempts to mediate the grievance through informal conferences in the academic department where the academic action occurred and ends with a more formal appeal hearing before a panel consisting of University administrators, a faculty member, and a student. At the conferences and hearings the student has a right to representation. Under this procedure, because the Nursing College is not divided into academic departments, the dean of the College handles the initial stages of the grievance. If the grievance is not resolved at the dean's level, then the Office for Academic Affairs becomes involved.

An academic grievance is a complaint about an action which directly affects the grade that a student received on a test or in a course. A grievable academic action may involve a mathematical error in computing a student's grade, a change in the course requirements, or other such similar matters. Academic grievances do not encompass

student complaints about conduct of faculty members or administrators that are unrelated to grades or course requirements.

On September 14, 1987, petitioner met with Dean Mobley and gave to her a written complaint. In this complaint petitioner asked the University to fire Assistant Professors Nelson and Adams for alleged criminal acts, collusion, lack of professionalism, and mental cruelty. Although petitioner asked for reinstatement in the University, he did not complain that he had been unfairly graded in Nursing 256. The matters alleged by petitioner were not academic grievances; however, since Dean Mobley knew that he had received a failing grade in Nursing 256, she gave him a copy of the University-Wide Academic Grievance Procedures.

Subsequently, petitioner spoke with Dr. Sayers, Vice President for Academic Affairs, about his complaints against his professors. Dr. Sayers told petitioner that the only option available to him would be to contest his grade in Nursing 256 by filing an academic grievance, which would be handled initially by Dean Mobley.

After several meetings with petitioner, Dean Mobley sent him a letter on December 7, 1987. In her letter she recounted their previous meetings and reminded him of their discussions about the academic grievance procedures. She explained to him that until she received a written academic grievance about his Nursing 256 grade, there could be no hearing. She also suggested that he could contact Dr. Buttram, Director of Student Services, for assistance in drafting an academic grievance. Clerk's Record [hereinafter "CR."] at 581-82.

On December 9, 1987, petitioner submitted to Dean Mobley academic grievances against Associate Dean Awtrey and Assistant Professors Nelson and Adams. Dean Mobley then promptly initiated the procedures outlined in the University-Wide Academic Grievance Procedures.

Also in accordance with the procedural guidelines, Dean Mobley met with petitioner in January, 1988, to discuss the procedures for processing his academic grievances. At this conference petitioner explained to her that he had asked several non-University agencies to conduct investigations and that he wanted to receive a response from these external agencies before continuing with the academic grievance procedures. Based on petitioner's request, Dean Mobley agreed to delay the grievance procedures until he contacted her. Deposition of James Davis Nelson (2/7/90) [hereinafter "Nelson Dep."] at 57-59.

Shortly thereafter, Dean Mobley, fearing that petitioner's delay request might indefinitely postpone the proceedings and hopeful that the informal conferences provided for in the procedures might resolve the matter or narrow the issues involved, reconsidered her decision to grant his request for a delay. CR. at 584-85. On February 2, 1988, Dean Mobley sent petitioner a letter explaining her decision to move ahead with the grievance procedures. She then resumed the academic grievance procedures by scheduling informal conferences between petitioner and the individuals who were named in his academic grievances. On February 2, 1988, she notified him of the dates for these informal conferences. CR. at 630-35.

Approximately three weeks later, petitioner filed complaints against Dean Mobley, one of which was based upon her resumption of the academic grievance procedures. Along with these complaints, petitioner again asked for a delay in the academic grievance procedures and demanded Dean Mobley's recusal from the academic grievance procedures. Nelson Dep. at 63-65, Def. Exs. 4, 5.

As a result of petitioner's complaints and demands, Dean Mobley recused herself and notified petitioner that the informal conferences were canceled and that the Office

of Academic Affairs would contact him about his academic grievances.

A few days later, Dr. Donald Crump, Assistant Academic Vice President in the Office of Academic Affairs, contacted petitioner and scheduled a meeting with petitioner for February 29, 1988, to discuss the handling of his academic grievances.

The meeting on February 29, 1988, was attended by Dr. Crump, Kenneth L. Goodwin, petitioner, and several of petitioner's friends. Mr. Goodwin attended the meeting at Dr. Crump's request and was introduced by Dr. Crump as one of the University's attorneys. During the meeting Mr. Goodwin and Dr. Crump asked petitioner several questions to determine how he wanted his academic grievances handled in view of Dean Mobley's removal from the academic grievance procedures. CR. at 547-49.

During this meeting petitioner asked for a third time that the University delay any further action on his academic grievances until he had heard from the non-University agencies that were allegedly conducting investigations at his request. Petitioner said that when he heard from these agencies, he would contact Dr. Crump to discuss resumption of the academic grievance procedures. Dr. Crump granted petitioner's request for an indefinite delay in the academic grievance procedures. CR. at 548-59; Nelson Dep. at 36-37.

Shortly thereafter, petitioner filed numerous non-academic complaints unrelated to his Nursing 256 grade against Dr. Crump, Mr. Goodwin, Academic Vice President Sayers, University President Thomas, Chancellor Bartlett, and Governor Guy Hunt. Along with these complaints, petitioner continued to demand that the University take no further action on his academic grievances until the conclusion of the investigations by the external

agencies.[3] Nelson Dep. at 105-08, 112-18, Def. Exs. 9, 10, 11, 12.

From the time petitioner initially submitted his academic grievances on December 9, 1987, until the filing of his lawsuit on April 26, 1989, petitioner never contacted Dr. Crump to request a resumption of the academic grievance procedures. Nelson Dep. at 113. In accordance with petitioner's demands, Dr. Crump never recommenced the grievance procedures.

B. What This Case Is Not About.

1. *The Case Is Not About Non-Academic Grievances.*

This case does not concern petitioner's non-academic complaints against his instructors and other University officials.

Petitioner filed multiple non-academic grievances against Dean Mobley, Assistant Academic Vice President Crump, and a host of other University officials.[4] Although petitioner had a right to complain about non-academic matters, he had no right to a hearing on them, and offered no evidence to the contrary.

Since petitioner has no right to a hearing on non-academic complaints, he has not suffered a denial of due process, and the absence of a hearing on his non-academic complaints is not probative of his academic grievance due process claim. Further, petitioner abandoned any claims concerning his non-academic complaints when he admitted to the Alabama Supreme Court in his reply brief that his appeal did not concern non-academic grievances.

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[3] At his deposition on February 7, 1990, petitioner acknowledged that he still had not received a reply from the outside agencies.

[4] These non-academic grievances alleged such matters as "unprofessionality with respect to using an adjective in which she could not and would not define." Nelson Dep., Def. Ex. 6.

2. *The Case Is Not About The Merits of Petitioner's Academic Grievances.*

The merits of petitioner's academic grievance are not before this Court. The petition contains numerous statements about the loss of petitioner's final examination,[5] the alleged conflicts with his instructors, and the alleged fabricated documents. Petitioner says the lower courts ignored these matters and therefore erred in granting respondents' summary judgment.

Petitioner's contention is preposterous. The trial court's summary judgment order clearly indicated that it was "making no ruling as to the merits of plaintiff's grievances . . . since those matters are not before this court, and are not ripe for review by a Circuit Court." Petition for Writ of Certiorari [hereinafter "Pet."] at a-12, *Nelson v. University of Alabama Sys.*, 594 So. 2d 632 (Ala. 1992) (No. 91-1873).

C. This Case Is About Summary Judgment.

This case concerns whether the trial court properly entered summary judgment in accordance with the standards in Rule 56 of the Alabama Rules of Civil Procedure. Petitioner argues not only in the courts below but also to this Court that he presented substantial evidence that was sufficient to preclude summary judgment in the respondents' favor; however, the record shows otherwise.

It is uncontradicted that the lack of a hearing on the academic grievances was due solely to petitioner's repeated requests for an indefinite halt to the due process proceedings. Nowhere in any of the evidence does petitioner ever deny that he asked for delays in the hearings. The courts below correctly concluded that there was no basis for his academic grievance due process claim.

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[5] Petitioner claims his September 14, 1987 non-academic grievance notified the University not to lose his final examination. However, that complaint does not reference either his final examination or his grades. CR. at 598-601.

Petitioner also argues here and below that there are material facts which support his equal protection claim. Petitioner again points to no specific facts which would show that there is an issue for trial.

Respondents' undisputed evidence showed that the students with whom petitioner compared himself to support his equal protection claim were not similarly situated. For example, petitioner alleges that unlike a female student, he was not permitted to make-up the NLN test. The record shows that to make-up a test, a student must receive prior permission from the instructor. CR. at 663. The female student who was allowed to take the NLN test on a make-up date had requested permission to take the test at another time prior to the scheduled test date. Deposition of Janice Nelson (11/27/90) at 38-39. Prior to the NLN test date, petitioner did not contact any of his instructors to request permission to miss the test and take it on another date. CR. at 663-64, 690. Petitioner offered no evidence that female students who waited until after the NLN test date to request a make-up date were allowed to take the test on another date.

As another example, petitioner, who was academically suspended at the end of the 1987 spring semester, asserts he was denied the same opportunity as two female students to repeat a failed course. Yet, respondents' uncontroverted evidence shows that the two female students who were allowed to repeat Nursing 214 in the 1987 summer term were in good standing academically at the University at the end of the 1987 spring term. CR. at 895-97. Petitioner produced no evidence that female students who were academically suspended at the end of the 1987 spring term were permitted to repeat a course during the summer semester.

Petitioner's conspiracy claim fails because he offered no material facts establishing his academic grievance due process and equal protection claims. Therefore, summary judgment on this count was correct.

D. Questions Raised Below.

In his motion to vacate, alter or amend the summary judgment which was filed with the trial court, petitioner raised the issue that the trial court had failed to consider evidence which would have precluded summary judgment. CR. at 985, 1012. After hearing this motion, the court declined to rule, and after ninety days the motion was denied procedurally. Ala. R. Civ. P. 59.1. On appeal to the Supreme Court of Alabama, petitioner raised the same question. Appellant's Opening Brief at 16-17, *Nelson v. University of Alabama Sys.* (No. 1901633). The Alabama Supreme Court affirmed the trial court's entry of summary judgment for the respondents.[6]

In the text of his application and brief for rehearing to the Alabama Supreme Court petitioner for the first time claims that the erroneous entry of summary judgment constituted a deprivation of due process. Appellant's Application for Rehearing and Rehearing Brief at 4, 57, *Nelson v. University of Alabama Sys.* (No. 1901633). The application for rehearing was denied without opinion. Pet. at a-10-11.

REASONS FOR DENYING THE WRIT

Petitioner alleges that the entry of summary judgment against him constitutes a denial of his right to a jury trial. Petitioner further asserts that the lower courts ignored evidence which establishes genuine issues for trial. Petitioner's contentions are unfounded in law and in fact.

I. SUMMARY JUDGMENT DOES NOT DENY ONE'S RIGHT TO A JURY TRIAL.

Summary judgment is a proper method for disposing of a case in which a trial is unnecessary, but only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In one sense, the purpose of summary judgment is to decide

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[6] Review of summary judgment on appeal is *de novo. Hightower & Co. v. United States Fidelity and Guar. Co.*, 527 So. 2d 698 (Ala. 1988).

whether the non-moving party has a right to a jury trial. When petitioner failed to establish the existence of any genuine issues of material fact, a trial was unneeded.

Courts should exercise caution to avoid denying a non-moving party a jury trial where disputed material facts exist. But when a court is convinced that there are no controverted material facts, then the court's entry of judgment against the non-moving party is proper and is not a denial of that party's right to a jury trial. *See, e.g., Fidelity & Deposit Co. of Maryland v. United States to Use of Smoot*, 187 U.S. 315 (1902); *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962).

II. THE DECISION BELOW IS CORRECT.

The lower court correctly applied the summary judgment standard outlined in Rule 56(c) of the Alabama Rules of Civil Procedure. After respondents made a prima facie showing that there were no disputed material facts and that they were entitled to judgment as a matter of law, the burden of production shifted to petitioner to establish genuine issues of material fact. Ala. R. Civ. P. 56(e). Petitioner failed to carry this burden.

Petitioner does not here or in the courts below articulate any specific material facts that would preclude summary judgment. As he did below, petitioner urges consideration of the extensive extraneous evidence relating to his non-academic grievances and the merits of his academic grievances as proof of the disputed material facts supporting his claims, and points to nothing else. The courts below properly found this evidence immaterial and inadequate to preclude summary judgment.

Standards for granting summary judgment are well settled. When the moving party makes a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, then in order to defeat the entry of summary judgment the non-moving party must produce evidence to establish

the existence of material facts. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Hammond v. Auburn University*, 669 F. Supp. 1555 (M.D. Ala. 1987), *aff'd* 858 F.2d 744 (11th Cir. 1988), *cert. denied*, 106 S. Ct. 1134 (1989).

Petitioner has utterly failed to produce any evidence which would preclude summary judgment. Respondents' evidence of the initiation of the academic grievance procedures, of petitioner's numerous requests for indefinite delays in those procedures, of petitioner's many complaints against every University official involved in the academic grievance process, and of the lack of similarity between petitioner and other students who repeated courses or tests stands uncontroverted by petitioner. Petitioner has produced no evidence that he was entitled to a hearing on his non-academic grievances, that he requested the University to resume the academic grievance procedures, or that any University official acted in any way, individually or in concert with others, to deny petitioner a hearing when he was rightfully entitled to one. Petitioner's allegations and conclusory statements to the contrary are powerless to preclude summary judgment. *See Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990).

The decisions below also were fair. In December, 1987 petitioner availed himself of the opportunity to contest a failing grade by initiating an academic grievance. When he requested delays in that procedure, the University accommodated his wishes even though it was not required to do so. Since the petitioner, not the University, sought and obtained a cessation of the due process mechanism, he cannot now legitimately and in good faith complain of unfair treatment. The lower courts' decisions confirm that petitioner was justly treated.

III. THIS CASE IS NOT IMPORTANT AND PRESENTS NO SUBSTANTIAL FEDERAL ISSUES.

Petitioner asks this Court to review the factual findings of the lower courts, but in doing so he does not direct this Court's attention to specific facts which establish a genuine issue of material fact. Rather, petitioner urges this Court to sift through the entire record on the chance it may discover a disputed material fact which two other courts could not find.

A petition that merely asks for review of the sufficiency of the evidence ignores this Court's proper function. As Justice Frankfurter has admonished:

> [T]he court in these four cases has merely reviewed evidence that has already been reviewed by two lower courts, and doing so it ignores our strictures to the bar that 'We do not grant a certiorari to review evidence and discuss specific facts.' (citations omitted).

Rogers v. Missouri Pac. R. R., 352 U.S. 500, 537 (1957) (Frankfurter, J., dissenting).

The courts below thoroughly reviewed the record in this case. In the absence of obvious or exceptional errors, this Court should refrain from reviewing the factual findings of the lower courts. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

This case does not present an important federal issue that justifies review by this Court. The facts of the case are unique to the parties involved, and the legal issues have no broad public importance. The lower courts' application of the legal standards for summary judgment is consistent with the decisions of other state courts of last resort and U.S. courts of appeals. The summary judgment cases cited by petitioner confirm that the law is well settled. When a case will not resolve an unsettled area of the law or address substantial or far-reaching constitutional issues, certiorari should be denied. *See*

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

CONCLUSION

The petition offers no compelling reasons for review by this Court. No substantial constitutional issues are presented by the petition and the decisions by the lower courts were correct.

In support of their summary judgment motion respondents demonstrated that there were no issues for trial and that they were entitled to judgment. When petitioner did not produce the quantum of evidence necessary to establish disputed issues of material fact supporting his claims, then the lower courts correctly concluded that petitioner had no right to a trial on his allegations. Justice Harlan has expressed the same sentiment:

> [P]etitioner . . . was able to produce no evidence to support his charges . . . . He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence. Courts do not exist to afford opportunities for such litigating gambles. (citations omitted).

Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 468-69 (1962) (Harlan, J., dissenting).

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

PAUL E. SKIDMORE *
GEORGE B. GORDON
Office of Counsel
THE UNIVERSITY OF ALABAMA SYSTEM
P.O. Box 870106
Tuscaloosa, AL 35487-0106
(205) 348-5490
Attorneys for Respondents

* Counsel of Record

June 1992

APPENDIX

APPENDIX

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1991-92

1901633

JAMES DAVIS NELSON, JR.

v.

UNIVERSITY OF ALABAMA SYSTEM, *et al.*

Appeal from Tuscaloosa Circuit Court
(CV-89-409)

SHORES, JUSTICE.

A former nursing student, James Davis Nelson, Jr., filed this action against the University of Alabama and several of its faculty members and administrators on April 26, 1989.[1] His suit sought monetary damages, reinstatement in the University, and damages based on 42

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[1] The plaintiff's complaint lists as defendants: "The University of Alabama System, Trustees of the University of Alabama System, and Trustees of the University of Alabama, Chairman, Hon. Governor Guy Hunt, Mr. Thomas Bar[t]lett, Former Chancellor, Mr. Sam Earl Hobbs, Interim Chancellor, The University of Alabama, Dr. Joab Thomas, Former President, Dr. Roger Sayers, Interim President, Dr. Douglas Jones, Vice-President Academic Affairs, Dr. Donald Crump, Assistant Vice-President, Mr. Kenneth Goodwin, Office of Counsel, Officially and Individually, Dr. Norma K. Mobley, Former Dean, Capstone College of Nursing, Officially and Individually, Dr. Janet Awtry, Dean, Capstone College of Nursing, Ms. Janice Nelson, Course Leader Instructor, Officially and Individually, and Ms. Marsha Adams, Assistant Professor of Nursing, Officially and Individually."

U.S.C. § 1983 claims of denial of due process, denial of equal protection (gender discrimination), and conspiracy. The trial judge entered a summary judgment in favor of the defendants. Nelson appealed. We affirm.

The record reflects that James Davis Nelson, Jr., entered the University in the fall 1986 semester to pursue a course in nursing. Because of poor grades, he was placed on indefinite academic suspension at the end of the fall semester. However, the University waived his suspension and allowed him to enroll in nursing courses for the 1987 spring semester. He enrolled in two courses—Nursing 214, "Medication Calculations"; and Nursing 256, "Nursing Process." At issue is his performance in Nursing 256, a course that requires the student to obtain a satisfactory evaluation in the clinical part of the course and to sit for the National League of Nursing Achievement Test. As a consequence of his poor academic performance during the spring semester, he was again placed upon indefinite academic suspension.

Following this suspension, Nelson complained to Dean Mobley and Associate Dean Awtrey that the reason for his failure was incompetence on the part of his professors. They advised him that he could file an academic grievance under the University academic grievance procedure. On September 14, 1987, Nelson met with Dean Mobley and gave her a written complaint in which he asked that the University fire two professors. However, Nelson did not submit a written academic grievance about his grades until December 9, 1987. The record reflects that a series of meetings and discovery procedures followed. During this period, Nelson made repeated demands for a delay in the grievance procedure. Nelson filed this action on April 26, 1989.

The court heard motions for summary judgments by both the plaintiff and the defendants. The judge entered a summary judgment for the defendants, stating in his order:

"This cause came to be heard on February 19, 1991, on plaintiff's motion for summary judgment and defendant's motion for summary judgment. After reviewing all evidence submitted and arguments and briefs of counsel, this court finds that although there are disputed facts, there is no evidence of disputed material facts. Defendants have presented substantial evidence rebutting plaintiff's claims, and the plaintiff has presented no substantial evidence in support of his claims of denial of due process, denial of equal protection (gender discrimination), and civil conspiracy. Therefore all defendants are entitled to a summary judgment as to all claims as a matter of law, and it is ordered that summary judgment be granted in favor of all defendants as to all of plaintiff's claims. In so ordering, this court is making no ruling as to the merits of plaintiff's grievances, which have been filed against various officials of the University of Alabama, since those matters are not before this court, and are not ripe for review by a Circuit Court. Those grievances are still pending, and the parties are encouraged to resolve those grievances promptly without further delay.

"Costs of this action are taxed to the plaintiff for which let execution issue.

"Ordered this 21st day of February, 1991."

The issue before us is whether the trial court erred in entering the summary judgment for the defendants. Rule 56, A. R. Civ. P., sets forth a two-tiered standard for determining whether to enter a summary judgment. In order to enter a summary judgment, the trial court must determine: 1) that there is no genuine issue of material fact, and 2) that the moving party is entitled to a judgment as a matter of law. In determining whether a summary judgment was properly entered, the reviewing court must view the evidence in a light most favorable to the nonmovant. See *Turner v. Systems Fuel, Inc.*, 475

So.2d 539, 541 (Ala. 1985); *Ryan v. Charles Townsend Ford, Inc.*, 409 So.2d 784 (Ala. 1981). Rule 56 is read in conjunction with the "substantial evidence rule" (§ 12-21-12, Code 1975), for actions filed after June 11, 1987. See *Bass v. SouthTrust Bank of Baldwin County*, 538 So.2d 794, 797-98 (Ala. 1989). In order to defeat a properly supported motion for summary judgment, the plaintiff must present "substantial evidence," i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala. 1989).

We have carefully examined the record in this case and conclude that the judgment of the trial court should be affirmed. The record in this case is lengthy, running to five volumes; yet there is much extraneous matter and the trial court correctly concluded that although there are disputed facts, there is no evidence of disputed *material* facts.

Nelson first contends that the defendants denied him due process and discriminated against him because of his gender. There is simply no evidence to substantiate this claim. In fact, the evidence reflects that Nelson himself requested that the academic grievance procedures be halted, and he now claims the halt to be a denial of due process to him.

Nelson further claims that the defendants conspired to deny him a hearing on his academic grievances. He presented no evidence to support this claim. A civil conspiracy requires a combination of two or more individuals to accomplish an unlawful purpose or to accomplish a lawful end by unlawful means. *Barber v. Stephenson*, 260 Ala. 151, 69 So.2d 251 (1953); *Eidson v. Olin Corp.*, 527 So.2d 1283, 1285 (Ala. 1988). While it appears that Nelson's contention is that University officials conspired to shift his grievances among themselves and thus to deny

him due process, the record reflects that any shifting of Nelson's academic grievances was due to Nelson's own actions. He has thus failed to show a wrong committed upon which a claim of civil conspiracy could be based.

On a motion for summary judgment, when the movant makes a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law, as in the present case, the burden shifts to the nonmovant to show "substantial evidence" in support of his position. *Bean v. Craig*, 557 So.2d 1249, 1252 (Ala. 1990). The record reflects that, as to each claim, Nelson failed to produce substantial evidence to establish a genuine issue of material fact. A summary judgment motion is not defeated by conclusory allegations or speculation that fact issues exist, and bare argument or conjecture will not satisfy the nonmoving party's burden to offer facts to defeat the motion. *Williams v. Palmer*, 277 Ala. 18, 168 So.2d 220 (1964); *Riggs v. Bell*, 564 So.2d 882, 884 (Ala. 1990). Therefore, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Houston, and Kennedy, JJ., concur.

IN THE CIRCUIT COURT
FOR TUSCALOOSA COUNTY, ALABAMA

Civil Action No. CV89-409

JAMES DAVIS NELSON, JR.,
Plaintiff

vs

THE UNIVERSITY OF ALABAMA SYSTEM, *et al.*,
Defendants

NOTICE OF RULING

The defendant's motion to dismiss being argued orally on November 8, 1989 and briefs of counsel being considered it is hereby ordered as to each count separately:

COUNT I: Motion to Dismiss for failure to state a claim granted in favor of all defendants on fraud claim.

COUNT II: Motion To Dismiss for failure to state claim is granted in favor of all defendants.

COUNT III: Motion To Dismiss for failure to state claim is hereby granted as to all defendants.

COUNT IV: Motion To Dismiss for failure to state a claim is hereby granted as to all defendants.

COUNT V: Motion To Dismiss for failure to state a claim is hereby granted as to all defendants.

COUNT VI: Motion To Dismiss for failure to state a claim denied as to defendants Dr. Donald Crump, Kenneth Goodwin, Dr. Norman Mobley, Dr. Janet Awtry, Mrs. Janice Nelson, and Ms. Marsha Adams, and granted as to all other defendants.

COUNT VII: Motion To Dismiss for failure to state a claim denied as to defendants, University of Alabama, Norma Mobley, Dr. Douglas Jones, Kenneth Goodwin, Dr. Janet Awtry, Janice Nelson, Donald Crump, and Marsha Adams, and granted as to all other defendants.

COUNT VIII: Motion To Dismiss denied as to defendants, University of Alabama, Dr. Norma Mobley, Dr. Janet Awtry, Mrs. Janice Nelson, and Mrs. Marsha Adams and granted as to all other defendants.

This 28th day of December, 1989.

/s/ Thomas S. Wilson
Circuit Judge

Distribution:

Court file

Attorneys: Julia Asam
George B. Gordon/Stanley J. Murphy

Office file